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In The Supreme Court of the United States

ROBERT GRADY JOHNSON,

Petitioner,

v.

MIKE MULLIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner is entitled to certiorari review when he has failed to establish any compelling federal question, or that the Tenth Circuit misapplied a decision of this Court, with his claim that the Oklahoma Court of Criminal Appeals interpreted Oklahoma law in such a way that he did not have notice that his conduct was criminal.

2. Whether Petitioner is entitled to certiorari review when he has failed to establish any compelling federal question, or a misapplication of this Court's case law, on his claim that the evidence is insufficient to establish he was present in the bank during the robbery and murders, when that claim has already been rejected by each of the reviewing courts.

3. Whether Petitioner is entitled to certiorari review when he has failed to establish any compelling federal question, or a misapplication of this Court's case law, on his claim that his rights under the Due Process and Confrontation Clauses were violated when the trial court limited his cross-examination of a witness, when the subject on which he sought to cross-examine the witness was brought out in other testimony.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for a writ of certiorari to review the Order of the United States Court of Appeals for the Tenth Circuit, entered October 26, 2007, and reported at *Johnson v. Mullin*, 505 F.3d 1128 (10th Cir. 2007). *See* Petitioner's App. A at 1a-62a.

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence imposed on July 28, 1993, in the District Court of Comanche County, State of Oklahoma, Case No. CRF-1984-597.[1] Petitioner was convicted by a jury of four counts of Murder in the First Degree in violation of Okla. Stat. tit. 21, § 701.7(B) (1981) (Counts I-IV); three counts of Shooting with Intent to Kill in violation of Okla. Stat. tit. 21, § 652 (1981) (Count V-VII); and one count of Attempted Shooting with Intent to Kill in violation of Okla. Stat. tit. 21, § 652 (1981) (Count VIII). Petitioner was sentenced to consecutive terms of life

[1] Petitioner was first tried in a joint trial with his co-defendant Jay Wesley Neill in May 1985. However, the Oklahoma Court of Criminal Appeals reversed both Petitioner's and Neill's convictions and remanded their cases for new separate trials in *Neill v. State*, 827 P.2d 884, 886, 894 (Okla. Crim. App. 1992), on the basis that the joint trial violated their due process rights.

imprisonment without the possibility of parole on each of Counts I through IV, twenty years on each of Counts V through VII, and ten years on Count VIII.

The Oklahoma Court of Criminal Appeals (hereinafter "OCCA") dismissed Petitioner's first attempt to directly appeal his convictions resulting from his July 1993 trial because he failed to file a brief. *Johnson v. Champion*, 288 F.3d 1215, 1218 (10th Cir. 2002). When the state courts denied his request for an appeal out of time, Petitioner sought federal habeas corpus relief in the United States District Court for the Western District, wherein he claimed he was denied the right to appeal his convictions. *Id.* at 1219-21. When the District Court ultimately denied him relief, Petitioner then appealed the District Court's decision to the United States Court of Appeals for the Tenth Circuit in Case No. 01-6183. *Id.* at 1223, 1230. The Tenth Circuit ordered that the State grant Petitioner an appeal out of time and the assistance of counsel, or release him from custody. *Id.* at 1230.

In Case No. F-02-918, Petitioner returned to state court and directly appealed his convictions to the OCCA, which affirmed his convictions on all counts. *See* Petitioner's App. E at 135a-184a. Petitioner then sought federal habeas relief by filing a Petition for Writ of Habeas Corpus in Case No. CIV-04-1602-L in the United States District Court for the Western District of Oklahoma. A Report and Recommendation was issued by the Honorable Doyle W. Argo, United States Magistrate Judge, recommending Petitioner's Petition be denied. *See* Petitioner's App.

D at 66a-134a. The Honorable Tim Leonard, United States District Judge for the Western District of Oklahoma issued an Order and Judgment, wherein he adopted the Report and Recommendation in its entirety, denied Petitioner's Petition, and dismissed the action. *See* Petitioner's Apps. B and C at 63a-65a.

Petitioner appealed the District Court's denial of federal habeas relief to the United States Court of Appeals for the Tenth Circuit in Case No. 06-6260. The Tenth Circuit granted Petitioner a certificate of appealability on eight issues. After briefing and oral argument by the parties, the Tenth Circuit affirmed the District Court's denial of relief on October 26, 2007. *Johnson*, 505 F.3d at 1160.

Respondent incorporates here by reference the statement of facts for Petitioner's case as set forth by the Tenth Circuit at *Johnson*, 505 F.3d at 1132-33:

> On the afternoon of December 14, 1984, a robbery occurred at the First Bank of Chattanooga in Geronimo, Oklahoma. During the course of the robbery, three bank employees were forced into a back room and stabbed to death. Five bank customers, including a married couple and their infant daughter, entered the bank during the robbery and were forced into the same back room. There, they were ordered to lie face down on the floor and all, except for the infant, were shot in the back of the head. One of the customers died from the gunshot wounds.

> Three days later, Johnson and Jay Wesley Neill, who shared an apartment in Lawton, Oklahoma, were arrested in a hotel in San Francisco, California, in connection with the bank robbery and murders. At the time of their arrest, Johnson and Neill were found to be in possession of numerous marked bills taken from the bank during the robbery. Law enforcement authorities also discovered that Johnson and Neill had used other marked bills to pay for hotel rooms, limousine rides, and shopping excursions in San Francisco.

Respondent specifically disputes the version of events Petitioner sets out in his Petition at 4-5, where he claims Neill acted alone in planning and executing the robbery and murders. Rule 15(2), *Rules of the Supreme Court of the United States* ("[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted.").

The facts concerning Petitioner's involvement in the planning and execution of the robbery can be found in more detail in the Tenth Circuit's discussion of Petitioner's sufficiency of the evidence claim. *Johnson*, 505 F.3d at 1135-37 (quoting Petitioner's App. E at 138a-142a). In addition to his involvement prior to the crime, Petitioner was also present inside the bank when he and Neill committed the robbery and murders. One of their victims, Marilyn Roach

> clearly and unequivocally testified that, after she and three other bank customers (the Robles and Ralph Zeller) were shot, she heard a voice say, "I thought I told you not to shoot anybody," and a second, distinct voice respond, "[W]ell they moved." Consistent with having heard two voices, Roach asked at the time of her rescue from the bank, "[A]re *they* gone?"

Johnson, 505 F.3d at 1138 (emphasis in original) (citations to trial transcript omitted). The Tenth Circuit also found

> that the murders of the three bank employees could not have been committed in the manner that they were unless both Neill and Johnson were present at the bank. Immediately following the crime, the three bank employees (Kay Bruno, Joyce Mullenix, and Jerri Bowles) were found dead in a back room, laying on their stomachs, touching or nearly touching each other. Richard Boatsman, the medical examiner for Comanche County, Oklahoma, who performed the autopsies on the three bank employees, testified that each victim suffered multiple stab wounds (Bruno suffered thirty-four stab wounds, Mullenix suffered twenty-seven stab wounds, and Bowles suffered fourteen stab wounds), including large, gaping, "back and forth sawing type of incisional wound[s]" to their necks, each of which would have taken considerable work and effort. Despite the quantity and severity of these wounds, Boatsman found no defensive wounds on any

> of the three victims, except for perhaps one defensive wound on the finger of Ms. Bowles. . . . [I]t is unlikely that one perpetrator could have physically controlled all three women in a manner that would have allowed him to carry out the relatively lengthy attacks without any of the women attempting to fight back or flee. . . . [T]he more likely scenario is that both Neill and Johnson were present at the scene, and one of them performed the actual killings while the other controlled the victims by the use of a gun or otherwise.

Id. (emphasis added) (citations to trial transcript omitted). Finally, Petitioner confessed to his presence in the bank, and his involvement in the crimes, to a jail inmate when they were confined in the Comanche County Jail in August 1988:

> According to witness Herman Williams, Johnson told Williams that he (Johnson) and Neill "planned it [the bank robbery] together and that they planned it in a way in which there would be no survivors." Williams further testified that Johnson told him "that the situation inside the bank got so gross until he [Johnson] had to leave" the bank and go sit in their automobile that was parked near the bank.

Johnson, 505 F.3d at 1138 (citations to trial transcript omitted).

Following the Tenth Circuit's denial of relief, Petitioner filed a Petition for Rehearing En Banc and

for Panel Rehearing, which was denied on November 26, 2007. Petitioner's App. F at 185a. Petitioner thereafter filed a Petition for Writ of Certiorari in this Court. Additional facts will be discussed below as necessary.

REASONS FOR DENYING THE WRIT

This Court's review of this matter is not required because Petitioner advances no compelling reason to grant certiorari. Petitioner makes no claim of a conflict in federal constitutional precedent that warrants resolution by this Court, nor does Petitioner develop a compelling federal constitutional issue that requires resolution by this Court. Furthermore, the issues upon which he seeks review do not warrant relief from this or any other federal court.

The Tenth Circuit properly reviewed Petitioner's claims under the provisions of the "Antiterrorism and Effective Death Penalty Act of 1996", 142 Cong. Rec. H3305-01 (1996) (the "AEDPA"), including the standard of review provisions of 28 U.S.C. § 2254(d). *Johnson*, 505 F.3d at 1133-34. As relevant in this case, Section 2254(d) provides that an application for a writ of habeas corpus shall not be granted unless the state court adjudicated a claim on the merits which "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States", or "that was based

on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See also Williams v. Taylor*, 529 U.S. 362, 407-10 (2000). Based on this standard of review, the Tenth Circuit denied Petitioner relief on each of his claims, including the three he raises herein. *Johnson*, 505 F.3d at 1140, 1143, 1145, 1160. For the reasons stated below, Respondent respectfully asserts this Court should deny Petitioner's Petition for a Writ of Certiorari.

I. PETITIONER WHOLLY FAILS TO DEVELOP ANY COMPELLING FEDERAL CONSTITUTIONAL ISSUE WARRANTING CERTIORARI REVIEW BY THIS COURT WITH HIS CLAIM THAT OKLAHOMA'S FELONY-MURDER STATUTE WAS UNLAWFULLY EXPANDED IN HIS CASE TO ENCOMPASS A PERSON NOT PRESENT AT THE SCENE WHEN THE FELONY AND MURDERS OCCURRED.

Petitioner claims in his petition to this Court that the United States Court of Appeals for the Tenth Circuit erred in affirming his four convictions for murder in the first degree while in the commission of a felony, arguing the decision conflicts with this Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Based on the record, however, Petitioner's claim is without merit, and he fails to show any compelling reason for this Court to grant his petition.

This Court's Rule 10 provides in pertinent part as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 10(c), *Rules of the Supreme Court of the United States*.

In this case, the Tenth Circuit first concluded the evidence presented by the State at Petitioner's trial was "sufficient for a rational jury to reasonably find that Johnson was present at the Bank during, and actively participating in, the robbery and murders." *Johnson v. Mullin*, 505 F.3d 1128, 1140 (10th Cir. 2007). The Circuit Court went on to properly agree with the lower courts that regardless of whether

Petitioner was actually present in the bank during the robbery and murders, the evidence was nevertheless sufficient to establish he was guilty of felony-murder as a principal because he aided and abetted Neill in the commission of the robbery. *Id.* at 1141-43; *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000).

Petitioner claims that Oklahoma's felony-murder statute was retroactively redefined and its scope expanded when it was combined with the aiding and abetting statute to encompass the acts of a person not actually present during the commission of a felony.[2] He asserts the Tenth Circuit's decision denying him habeas relief on this claim conflicts with *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964), wherein this Court reiterated the long-recognized principle that "a criminal statute must give fair warning of the conduct that it makes a crime. . . . " This Court went on to note in *Bouie* that "a deprivation of the right of fair warning can result not only from vague statutory

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[2] The Tenth Circuit questioned whether Petitioner had exhausted this claim. *Johnson*, 505 F.3d at 1142. In his Petition, Petitioner responds by citing to his direct appeal brief to the OCCA (Petition at 14). As noted by the Tenth Circuit in finding the claim appeared unexhausted and procedurally barred, however, Petitioner's direct appeal briefs were not included in his appendix to that court. *Id.* at n. 2. *See also* 28 U.S.C. § 2254(b)(2) ("An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). Nevertheless, assuming for the purposes of argument the claim was exhausted, the Tenth Circuit addressed and rejected it on the merits.

language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352.

In *Bradshaw v. Richey*, 546 U.S. 74, 75-76 (2005), this Court found the Sixth Circuit Court of Appeals erred in its application of *Bouie* to grant the respondent habeas relief on the basis that he had no warning the transferred intent doctrine would apply to aggravated felony murder. There, despite the "perfectly clear and unambiguous" statement of the Ohio Supreme Court in the respondent's case to the contrary, the Sixth Circuit found the state court opinion should not "be read to endorse transferred intent in respondent's case because such a construction would likely constitute 'an unforeseeable and retroactive judicial expansion of narrow and precise statutory language,' in violation of the Due Process Clause." *Id.* at 76 (quoting *Bouie*, 378 U.S. at 352).

This Court reversed the Sixth Circuit's decision upon finding the respondent "could not plausibly claim unfair surprise that the doctrine applied in his case." *Id.* at 77. Before doing so, however, the *Bradshaw* Court first condemned the appellate court's interpretation of the Ohio law, which directly contradicted the statement of the state court, reiterating that "[w]e have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Id.* at 76. Based on *Bradshaw*, therefore, this Court is bound by the holding of the OCCA that the aiding and abetting

rule was specifically applicable to felony-murder cases, and that Petitioner's participation made him guilty as a principal to felony-murder. *See* Petitioner's App. E at 144a, 146a. Nevertheless Respondent shows that contrary to Petitioner's assertion, the Tenth Circuit's decision in this case is wholly in accord with *Bouie*, as well as *Bradshaw*, as both the Oklahoma statutes at issue and the case law interpreting those statutes, gave Petitioner notice that his conduct in the planning and execution of the robbery would subject him to prosecution under the felony-murder statute, regardless of whether he was present in the bank when the robbery and murders occurred.

Petitioner was charged with four counts of first degree felony-murder, by committing the offense of robbery with a dangerous weapon, which resulted in the deaths of the decedents:

> B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Okla. Stat. tit. 21, § 701.7(B) (1981). All three courts which have reviewed Petitioner's case found that, regardless of his presence in the bank, the evidence supported his convictions as a principal to the felony-murders under the theory of aiding and abetting. *Johnson*, 505 F.3d at 1143. *See also* Petitioner's App.

D at 81a, App. at E 146a-148a. Oklahoma's aiding and abetting statute reads:

> All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.

Okla. Stat. tit. 21, § 172 (1981). *See also Conover v. State*, 933 P.2d 904, 910 (Okla. Crim. App. 1997).

Petitioner calls "unfounded" the Tenth Circuit's finding that Oklahoma's aiding and abetting statute had been applied previously in a felony-murder case (Petition at 5). Contrary to Petitioner's claim, the application of these two statutes together has not been limited to Petitioner's case, as evidenced by prior decisions of the OCCA and the Tenth Circuit. *Lewis v. State*, 451 P.2d 399, 400 (Okla. Crim. App. 1967) (evidence sufficient to support conviction as principal of felony-murder conviction even though defendant did not participate in beating of victim); *State v. Jones*, 859 P.2d 514, 515 (Okla. Crim. App. 1993) (holding "Oklahoma law clearly permits prosecutions under our felony-murder statutes where the defendant or an accomplice actually performed the homicidal act"); *Oxendine v. State*, 350 P.2d 606, 611 (Okla. Crim. App. 1960) (holding evidence sufficiently supported conviction of felony-murder as "evidence showed that Oxendine purchased both the pistols that he and Spence were armed with, and that they

mutually agreed to the robbery"); *Chaney v. Brown*, 730 F.2d 1334, 1350-51 (10th Cir. 1984) (conviction upheld based on consideration of "theory of responsibility under the aider and abettor statute, together with the Oklahoma felony murder statute" where evidence showed petitioner at least aided and abetted felony during which victim was killed). In rejecting Petitioner's claim in this case, the Tenth Circuit noted that in *Chaney*, it had "effectively rejected the construction of Oklahoma's then-existing felony-murder statute that is now urged by Johnson in these proceedings." *Johnson*, 505 F.3d at 1142-43.

In addition to the above cases, the acknowledgment of the OCCA of the state legislature's policy behind the felony-murder statute in *Hatch v. State*, 662 P.2d 1377, 1384 (Okla. Crim. App. 1983) is yet further proof that Petitioner had sufficient notice that his actions would make him liable under this statute, regardless of his presence. There, the OCCA held:

> The legislature's definition of murder in 701.7(B) is a reflection of the policy that one who, by his wilfull criminal conduct, sets in motion a chain of events so perilous to the sanctity of human life that death results therefrom; must bear the ultimate responsibility for his actions. We agree with the legislature that murders effected in such a manner are as abhorrent as those which are premeditated. Proscribing such actions under our first-degree murder statutes performs the rational function of deterring the

> commission of felonies so inherently dangerous as to create forseeable risks of death.

Id. Petitioner's conduct in this case prior to the actual bank robbery is precisely the type of conduct which the OCCA pronounced a year before he committed his crimes as being the focus of deterrence by the felony-murder statute. In dismissing Petitioner's claim that the only thing he did was help Neill acquire the gun before the robbery, the Tenth Circuit found the evidence of his participation was far greater than that. *Johnson*, 505 F.3d at 1143. It is impossible to reach any conclusion other than it was clear Petitioner had sufficient notice that his conduct, regardless of his presence, was criminal under the felony-murder statute, and this Court must accept the interpretation by the OCCA of Oklahoma law that Petitioner could be convicted of felony-murder as an aider and abettor. *Bradshaw*, 546 U.S. at 76. *See also* Petitioner's App. E at 144a.

Petitioner challenges the Tenth Circuit's conclusion that *Lewis* and *Chaney* gave him sufficient notice that his acts were criminalized under the felony murder statute. *Johnson*, 505 F.3d at 1142-43. In so doing he seems to argue that because neither the OCCA nor the Tenth Circuit had ever addressed the exact factual scenario as presented by his case, that he therefore did not have fair warning that he was subject to prosecution for felony-murder. This Court, however, has specifically rejected this argument.

In *United States v. Lanier*, 520 U.S. 259, 261 (1997), this Court addressed a case in which the Sixth Circuit had vacated a defendant's convictions for lack of notice that his actions were criminal under 18 U.S.C. § 242, because "the constitutional right in issue [which the defendant was convicted of violating under color of law] had not previously been identified by this Court in a case with fundamentally similar facts." This Court found this standard to determine whether a defendant had fair notice that his conduct was criminal was improper, noting that it did not "demand[ ] precedents that applied the right at issue to a factual situation that is 'fundamentally similar'. . . ." *Id.* at 269. On the contrary, the *Lanier* Court acknowledged that it had upheld convictions under the statute at issue "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* Despite Petitioner's attempts in this case to distinguish *Lewis* and *Chaney*, Respondent has established above that he had more than fair warning that, even if he were not actually present in the bank, his conduct subjected him to prosecution under the felony-murder statute as an aider and abettor. *Lanier*, 520 U.S. at 269; *Bouie*, 378 U.S. at 350; *Bradshaw*, 564 U.S. at 75-76; *Hatch*, 662 P.2d at 1384.

Petitioner's claim that the plain language of the felony-murder statute gave him no notice that his acts were criminal is likewise unavailing. There is no

relevant difference between the malice murder and felony-murder statutes which would permit application of the aiding and abetting statute to malice murder, but not felony-murder, yet there can be no question that the aiding and abetting statute is routinely applied to malice murder cases. *See Glossip v. State*, 157 P.3d 143, 151 (Okla. Crim. App. 2007); *Banks v. State*, 43 P.3d 390, 397 (Okla. Crim. App. 2002); *Torres v. Mullin*, 317 F.3d 1145, 1155-56 (10th Cir. 2003); *Wingfield v. Massie*, 122 F.3d 1329, 1332 (10th Cir. 1997).

Here, Petitioner claims that his presence at the crime scene was required because the statute in question provided that "[a] person also commits the crime of murder in the first degree when **he** takes the life of a human being . . . in the commission . . . of robbery with a dangerous weapon. . . ." Okla. Stat. tit. 21, § 701.7(B) (1981) (emphasis added). The version of Section 701.7 in effect in 1984 also provided that "[a] person commits murder in the first degree when **he** unlawfully and with malice aforethought causes the death of another human being." Okla. Stat. tit. 21, § 701.7(A) (1981) (emphasis added). There is no distinction between these two provisions with regard to the accused's presence at the time of the crime, and as noted above, the aiding and abetting statute makes any person concerned in the commission of a crime a principal, regardless of his presence. Okla. Stat. tit. 21, § 172 (1981). Under Petitioner's interpretation, therefore, the aiding and abetting statute would never apply to the crime of first degree murder,

committed either with malice aforethought or during the commission of a felony. Okla. Stat. tit. 21, § 172 (1981). As noted above, this interpretation is simply contrary to the case law of the OCCA, as well as the Tenth Circuit addressing Oklahoma law. *See Glossip*, 157 P.3d at 151; *Banks*, 43 P.3d at 397; *Torres*, 317 F.3d at 1155-56; *Wingfield*, 122 F.3d at 1332. There can be no other conclusion in the case except Petitioner had more than fair notice that his conduct in planning and executing the robbery made him a principal to the crime of felony-murder, whether or not he was at the bank. *Lanier*, 520 U.S. at 269; *Bouie*, 378 U.S. at 350; *Bradshaw*, 564 U.S. at 75-76; *Hatch*, 662 P.2d at 1384.

Petitioner provides no compelling reason why this Court should exercise jurisdiction over this case. As shown above, his claim that the Tenth Circuit's decision to deny him habeas relief on his claim that he did not have notice that his actions would subject him to liability under Oklahoma's felony-murder statute is without merit. He is therefore unable to show the Tenth Circuit's decision in any way conflicts with this Court's precedent. For these reasons, Respondent urges this Court to deny certiorari review of this claim.

II. PETITIONER'S CLAIM THAT THE EVIDENCE IS INSUFFICIENT TO SHOW HE WAS PRESENT INSIDE THE BANK IS BASED ON HIS OWN INTERPRETATION OF THE FACTS, NOT ON ANY COMPELLING FEDERAL CONSTITUTIONAL ISSUE WARRANTING CERTIORARI REVIEW BY THIS COURT.

Petitioner next complains here, as he did in the state and federal habeas courts, that the evidence was insufficient to establish that he was present in the bank during the robbery and murders. In this claim, Petitioner rehashes his sufficiency of the evidence argument and urges this Court to grant certiorari review, claiming the Tenth Circuit's decision to affirm his convictions conflicts with this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979).

Review of the instant Petition reveals that Petitioner has provided no compelling reason why this Court should exercise jurisdiction over this case. Petitioner fails to even attempt to develop any compelling federal question, or conflict in federal law, that requires resolution by this Court. Rather, Petitioner does nothing more than re-urge the factually-based sufficiency of the evidence argument previously advanced, and correctly rejected, on direct appeal to the OCCA, on habeas review to the federal district court, and on appeal to the Tenth Circuit. This Court's Rule 10, however, states that "[a] petition for writ of certiorari is rarely granted when the asserted

error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, *Rules of the Supreme Court of the United States*. In this case, the Tenth Circuit relied upon *Jackson* to reject Petitioner's claim that the evidence was insufficient to show he was inside the bank during the robbery and murders. *Johnson*, 505 F.3d at 1140. Accordingly, the most Petitioner can possibly argue in this regard is a misapplication of *Jackson*, or erroneous factual findings. Neither is a basis for review by this Court and for this reason alone certiorari should be denied.

As cited by the Tenth Circuit in rejecting Petitioner's argument, this Court reviews sufficiency of the evidence arguments to determine whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphases in original) (citations omitted). The Tenth Circuit properly concluded the OCCA reasonably applied *Jackson*, finding the State presented sufficient evidence "for a rational jury to find that Johnson was present at the Bank during, and actively participating in, the robbery and murders." *Johnson*, 505 F.3d at 1140; *Williams*, 529 U.S. at 409-10.

As noted above, this Court, by its Rules, is disinclined to grant certiorari review based on a claim of erroneous factual findings. Rule 10, *Rules of the Supreme Court of the United States*. On one of the few occasions that this Court has reviewed a case for

sufficiency of the evidence, however, it was to find the Fourth Circuit Court of Appeals misapplied *Jackson* in finding the evidence was insufficient to support a conviction. *Wright v. West*, 505 U.S. 277, 296-97 (1992). In so finding, the *Wright* Court emphasized the holding in *Jackson*, that "'**all of the evidence** is to be considered in the light most favorable to the prosecution[ ]'. . . ." *Id.* at 296 (quoting *Jackson*, 443 U.S. at 319 (emphasis in original)). This Court's reiteration of the *Jackson* standard in *Wright* only emphasized the deference to be given the trier of fact in reviewing claims of sufficiency of the evidence. Pursuant to this deferential standard of review, it is not hard to determine why Petitioner's claim that the evidence was insufficient to show he was at the bank has been rejected by each of the three courts which has reviewed it. In his claim, Petitioner proclaims the evidence that he was not present at the bank "largely undisputed" and "as close to a scientific certainty as can ever be known in the law: Johnson was not at the bank." (Petition at 18). Quite to the contrary, in rejecting his claim the Tenth Circuit quoted the extensive factual findings by the OCCA outlining the evidence of Petitioner's involvement and showing his presence. *Johnson*, 505 F.3d at 1135-37 (quoting Petitioner's App. E at 138a-142a).[3] As he did below,

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[3] Petitioner reiterates his claim here that the evidence indicated the jurors did not believe he was in the bank during the robbery and murders (Petition at 18). In support of this claim, Petitioner cites the testimony of the mother-in-law of Karen Nobis, that Nobis, a juror removed between the guilt and

(Continued on following page)

Petitioner goes on to challenge the factual findings, specifically with regard to the testimony of Marilyn Roach; the inference that, due to the nature of the crimes, more than one person was present during the robbery and murders; the testimony of jail inmate Herman Williams; and the fact that Petitioner's alibi did not stand unchallenged (Petition at 18-22). That Petitioner's arguments focus solely on what he deems an erroneous interpretation of the facts is by itself reason enough for this Court to refuse to grant his Petition. Rule 10, *Rules of the Supreme Court of the United States*. That his arguments in this regard are also without merit is yet further reason for this Court to deny certiorari review of his Petition.

He first complains about the Tenth Circuit's citation to Marilyn Roach's testimony that she heard a conversation between two people regarding the shootings. *Johnson*, 505 F.3d at 1138. *See also* Statement of the Case. Petitioner dismisses Roach's testimony since she heard the conversation after she had been shot twice in the head. He ignores, however, the testimony of Dr. Charles Ingalls, the neurosurgeon who treated Roach in the emergency room (C.A. App. VII at 2240).

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penalty phases of trial, told her the jurors did not think Petitioner was in the bank (C.A. App. X at 3042). As noted by the Magistrate Judge in his Report and Recommendation, however, "[t]here was no admissible evidence of any such conclusion presented either during trial or in any subsequent proceedings." Petitioner's App. D at 80a, n. 5.

Dr. Ingalls testified that when he had contact with Roach approximately five hours after she was shot, she was conscious, responsive, and able to answer appropriately to the questions asked her (C.A. App. VII at 2240-41). Although one of the bullets would have impaired the hearing in her right ear, it would not have affected her left ear, which suffered no damage (C.A. App. VII at 2244). Dr. Ingalls testified that he found nothing in his examination of Roach which would indicate she could not have heard or recalled the conversation to which she testified (C.A. App. VII at 2245). Petitioner also ignores that the evidence which he claims makes her testimony incredible was before the jury, which was properly instructed that it was to determine the weight and credibility of each witness (citing C.A. App. X at 3286-3288). *See United States v. Scheffer*, 523 U.S. 303, 313 (1998) (holding that determining the weight and credibility of witnesses is the province of the jury).

Next Petitioner complains the Tenth Circuit relied on the argument by the prosecutor in closing argument with its finding that the murders "could not have been committed in the manner that they were unless both Neill and Johnson were present at the bank." *Johnson*, 505 F.3d at 1138. As noted by the Circuit Court, the prosecutor did indeed make this argument during the guilt-stage closing argument. *Id.* The prosecutor's argument, however, was not based on speculation as Petitioner asserts. It was an inference based upon the evidence presented at trial, which also provided the basis for the Tenth Circuit's

finding. The Circuit Court set out in detail the trial evidence which supported its finding as well as the prosecutor's argument. *Johnson*, 505 F.3d at 1138. *See also* Statement of the Case. Based on the evidence cited by the Circuit Court, it is clear its findings were based on, and fully supported by, the evidence at trial, and not on speculation as Petitioner claims. *See Jackson*, 443 U.S. at 318-19 (Evidence is viewed in the light most favorable to the prosecution.); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) (Closing argument is the time for counsel to argue the inferences to be drawn from the evidence and testimony.).

Petitioner next complains the Tenth Circuit should not have relied on the testimony of Herman Williams as evidence that Petitioner was inside the bank during the robbery and murders. *Johnson*, 505 F.3d at 1138. *See also* Statement of the Case. Petitioner's bases for denouncing Williams' testimony as incredible are the same bases raised before and rejected by the OCCA, the federal district court and the Tenth Circuit. *Id.* at 1152-54. *See also* Petitioner's App. D at 106a-109a, App. E at 170a-172a. Everything which Petitioner claims makes Williams' testimony unbelievable was before the jury for its consideration of how much weight, if any, to give his testimony (Petition at 20, citing C.A. App. VII at 2143, 2152, 2429). The Tenth Circuit rejected Petitioner's claim that the prosecutor knowingly introduced false testimony through Williams, finding he "was subjected to strenuous cross-examination by

defense counsel, and the issue of Williams' credibility was ultimately, and properly, left for the jury to determine." *Johnson*, 505 F.3d at 1154.

The Tenth Circuit's finding is entirely in accord with this Court's case law which holds that "[d]etermining the weight and credibility of witness testimony . . . has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" *Scheffer*, 523 U.S. at 313 (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)). *See also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982) ("By rejecting the District Court's findings simply because it would have given more weight to" certain evidence "than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact."). Based on the above, Williams' testimony was properly admitted, and it was within the jury's province to give it whatever weight and credibility it deemed appropriate, and the Tenth Circuit properly considered it in determining the evidence established Petitioner was inside the bank during the robbery and murders. *Scheffer*, 523 U.S. at 313; *Inwood*, 456 U.S. at 856.

Finally, Petitioner challenges the Tenth Circuit's dispute of his alibi, that he could not have been at the bank because he was sixteen miles away using the

telephone at Debbie Ward's apartment shortly before the robbery occurred.[4] He complains that the Tenth Circuit "grossly misconstrues the facts of the case", specifically, Ward's testimony regarding whether the car shared by Neill and Petitioner was in the apartment complex parking lot; the testimony of Ward's boyfriend, Brent Howard, that he and Ward left her apartment around 12:50 pm; the testimony of Ward's roommate, Dara Pope, that no one answered when she knocked on the door of Neill's and Petitioner's apartment at 2:00 pm and 2:30 pm that day; and the evidence regarding the driving time between the apartments and the bank (Petition at 20-22).

Petitioner first challenges the Tenth Circuit's finding that Ward was not sure whether the car owned by Petitioner and Neill was in the parking lot that afternoon, and he asserts her actual testimony was that she would have noticed the car had it been parked in the parking lot (Petition at 21). Ward indeed made this statement; however, as found by the Tenth Circuit, she also acknowledged her previous testimony that she did not particularly notice if the car was there or not (C.A. App. VI at 1920-21). Thus, the Tenth Circuit's characterization of her testimony at Petitioner's trial as being unsure of whether the car was in the parking lot is accurate, and certainly not a "gross misconstru[ction]" of the facts (Petition

[4] Respondent addresses Petitioner's claim regarding his alibi in more detail in the following proposition.

at 21). *Jackson*, 443 U.S. at 318-19 (Evidence is viewed in the light most favorable to the prosecution.).

Next Petitioner complains that the Tenth Circuit found Howard testified Petitioner left Ward's apartment at approximately 12:50 pm (Petition at 21). This is a misstatement of the Tenth Circuit's factual finding, as the Tenth Circuit noted Howard testified he [Howard] and Ward left Ward's apartment at 12:50 pm, not that Petitioner left at that time. *Johnson*, 505 F.3d at 1139. This is an entirely accurate statement of Howard's testimony in this regard (C.A. App. VI at 1681).

He next complains about the Tenth Circuit's citation to the testimony of Pope that no one answered when she knocked on the door of the apartment shared by Neill and Petitioner at 2:00 pm and again at 2:30 pm that day (Petition at 22). Although he claims this evidence is irrelevant because he and Neill were at the airport at that time, he makes no claim whatsoever that the Tenth Circuit's factual finding is erroneous.

Finally, he complains that the Tenth Circuit found the State introduced evidence that the sixteen-mile route between the apartment and the bank could be driven in ten to twelve minutes (Petition at 22). Respondent acknowledges that there was no evidence presented by the State that the route could be driven in this particular amount of time. However, Petitioner's claim that the evidence showed the fastest

time the route could be driven was seventeen minutes is also not accurate (Petition at 22). Petitioner ignores the testimony of Agent Richard Goss with the Oklahoma State Bureau of Investigation. Agent Goss testified that he was driving in his car when he heard the dispatch at 1:45 pm regarding the robbery and murders at the bank (C.A. App. IX at 2762). He arrived at the bank at 1:59 pm, only fourteen minutes later, and the distance he drove to arrive at the bank was approximately the same distance between the apartments and the bank (C.A. App. IX at 2767). He likewise testified that he exceeded the speed limit, though he did not remember by how much, but the car he was driving was unmarked, and was without sirens or overhead lights (C.A. App. IX at 2765-66, 2769).

In addition to fulfilling Respondent's obligation under this Court's Rule 15(2), *Rules of the Supreme Court of the United States*, the above discussion also highlights that all of the evidence about which Petitioner complains was before the jury for its consideration, and viewing all of the evidence in the light most favorable to the State, as this Court must, fully supports the determination that Petitioner was indeed present in the bank during the robbery and murders. *Scheffer*, 523 U.S. at 313; *Jackson*, 443 U.S. at 318-19.

Petitioner provides no compelling reason why this Court should exercise jurisdiction over this case. Respondent has established that the true focus of Petitioner's complaint is that the Tenth Circuit

resolved the conflicts in the evidence against him. Since Petitioner's claim that the evidence was insufficient to establish he was present in the bank is a purely factual issue, and because he is wholly unable to show the Tenth Circuit's decision conflicts with *Jackson*, he has not presented a basis for this Court's review. Rule 10, *Rules of the Supreme Court of the United States*. For these reasons, Respondent urges this Court to deny certiorari review of this claim.

III. CERTIORARI REVIEW BY THIS COURT OF PETITIONER'S CLAIM THAT HE WAS DENIED HIS DUE PROCESS AND CONFRONTATION RIGHT WHEN THE TRIAL COURT LIMITED HIS CROSS-EXAMINATION OF DEBBIE WARD IS NOT WARRANTED AS HE HAS FAILED TO SHOW THE TENTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S PRECEDENT.

Petitioner next complains the trial court violated his Due Process and Confrontation rights by limiting the cross-examination of Debbie Ward without a legitimate state interest in violation of this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Once again, Petitioner provides no compelling reason why this Court should exercise jurisdiction over this case, and this Court should deny his request for certiorari review.

On cross-examination, Debbie Ward answered in the affirmative defense counsel's question of whether

she recalled being asked at Jay Wesley Neill's retrial what time she left her apartment to return to work on December 14, 1984. *Johnson*, 505 F.3d at 1144. When he followed up by asking if she remembered that she responded it was "about two or three minutes after 1:00 o'clock", she stated she did not recall making that statement. *Id.* When asked, Ward said it would refresh her recollection to see the transcript. *Id.* The prosecutor objected however, and the trial court sustained the same, and defense counsel was not permitted to refresh Ward's memory with the transcript. *Id.*

The OCCA as well as the federal district court found that Petitioner should have been permitted to refresh Ward's testimony with the transcript, but that any such error was harmless. *See* Petitioner's App. D at 88a-93a, App. E at 154a-155a. In the habeas appeal of this case, the Tenth Circuit reviewed Petitioner's claim that he was denied the right to cross-examine Ward to determine whether the state appellate court's decision was contrary to or an unreasonable application of this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973). *Johnson*, 505 F.3d at 1145. The Tenth Circuit properly concluded in the negative and denied Petitioner habeas relief on this claim. *Williams*, 529 U.S. at 409-10.

In *Chambers*, 410 U.S. at 294, this Court held that

> [t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair

> opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

See also Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citations omitted). This Court subsequently clarified that "*Chambers* does not stand for the proposition that a defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *Scheffer*, 523 U.S. at 316. Instead, to show he was denied his right to present evidence in violation of due process, he "must show that the evidence excluded by the trial court's ruling might have affected the trial's outcome; in other words, he must show that the evidence, if admitted, would have created reasonable doubt that did not exist without the evidence." *Patton v. Mullin*, 425 F.3d 788, 797 (10th Cir. 2005) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868 (1982)).

Petitioner's request for review on the basis that the Tenth Circuit misapplied *Chambers* is by itself reason enough that certiorari review should be denied. Rule 10, *Rules of the Supreme Court of the United States* ("A petition for a writ of certiorari is

rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). That the record shows the Tenth Circuit correctly applied *Chambers* to find the state appellate court's decision was neither contrary to nor an unreasonable application of the decision is yet further reason for this Court to deny Petitioner certiorari review.

The Tenth Circuit first found cross-examination of Ward as to her prior testimony would not have affected the trial's outcome because Petitioner was responsible as a principal to the robbery and murders regardless of his actual presence at the bank. *Johnson*, 505 F.3d at 1145. "In other words, because of the application of [Oklahoma's aiding and abetting statute and felony-murder statute], it is beyond dispute that, had the trial court allowed defense counsel to refresh Debra Ward's testimony, it would not have altered the outcome of the trial." *Id.* at 1145-46. This is a correct application of *Chambers* as the improper limitation on cross-examination in this case clearly does not "call[ ] into question the ultimate 'integrity of the fact-finding process'. . . ." *Chambers*, 410 U.S. at 295 (citation omitted).

Additionally, the Tenth Circuit went on to review Petitioner's claim without regard to the application of Oklahoma's aiding and abetting statute. Addressing the issue in that light, the Tenth Circuit still found that the error did not alter the trial's outcome:

> As noted, Debra Ward's boyfriend, Brent Howard, testified as part of the State's case-in-chief that he and Ward left her apartment at approximately 12:50 p.m. on the day of the robbery (or at least sometime before 1 p.m.), and that he drove Ward back to her place of business for a 1:00 p.m. appointment. In light of Howard's testimony, the jury could reasonably have found that Johnson likewise left Ward's apartment at approximately 12:50, and that he and Neill then proceeded soon thereafter to drive to the Bank. In other words, even if defense counsel had been allowed to refresh Ward's testimony, the jury could still reasonably have concluded that Howard's time estimate was more accurate than Ward's (or that the actual time was somewhere between the two estimates), that Ward and Johnson actually left Ward's apartment before 1:00 p.m. that day, and that Johnson in turn was able to drive to the Bank with Neill and participate in the commission of the robbery and murders.

Johnson, 505 F.3d at 1146. As established below, the above findings by the Tenth Circuit are proper, as Petitioner can show neither that the exclusion of Ward's prior testimony "calls into question the ultimate 'integrity of the fact-finding process'", *Chambers*, 410 U.S. at 295, nor that "the evidence excluded by the trial court's ruling might have affected the trial's outcome. . . ." *Patton*, 425 F.3d at 797 (citing *Valenzuela-Bernal*, 458 U.S. at 868).

Petitioner also argues that had defense counsel been permitted to refresh Ward's memory with her previous testimony at Neill's re-trial, then the window of time during which he could have reached the bank would have been reduced to twelve to thirteen minutes. Petitioner's argument in large part relies upon an unreasonable assumption that the timepieces which provided the times in this case were precisely synchronized and kept the exact same time. Such an argument is contrary to common sense, however, and it is highly unlikely that when the change in Petitioner's airline reservation was time-stamped 12:54 pm, that it was also exactly 12:54 pm by the bank's clock, or by Ward's or Howard's clocks. By the same reasoning, the 1:15 pm time-stamp on the bank record does not mean it was also exactly 1:15 pm by Ward's or Howard's clocks, or by the travel agent's computer.

Petitioner asserts the facts of his case are "virtually identical" to the facts in *Chambers*. On the contrary, the facts of the two cases could not be more different. In *Chambers*, the defendant called a witness, Gable McDonald, who had previously confessed to the murder for which the defendant was on trial. *Id.*, 410 U.S. at 287, 291. On the stand, McDonald renounced his confession, and the defendant was prohibited by state law from impeaching his own witness. *Id.* at 291-92. He was also prohibited by state law from introducing evidence that McDonald had separately confessed to three other people that he committed the murder for which the defendant was

on trial. *Id.* at 292-93. This Court found in those circumstances that the exclusion of McDonald's out-of-court statements, combined with the refusal to allow the defendant to impeach McDonald, "denied him a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

Contrary to Petitioner's claim, the facts of his case are vastly different from the facts in *Chambers*. Here, the evidence excluded by the trial court's ruling was that Ward previously testified that she left a few minutes later than the time to which she was testifying at Petitioner's trial. Unlike the defense counsel in *Chambers* case, who was wholly prohibited from introducing any evidence of the witness' three separate confessions to three different people, defense counsel in this case was able to elicit from Ward that any testimony she could give regarding what time she left the apartment was only an estimate. On cross-examination, Ward testified she recalled previously telling defense counsel that she was due back at her job at 1:00 pm on the afternoon of Friday, December 14, 1984, that she was a few minutes late back to work that day, and that it took her approximately three minutes to get to work (C.A. App. VI at 1914-16). Moreover, with the exchange between Ward and defense counsel that took place in front of the jury before the trial court made its ruling, it was apparent to the jury that defense counsel had a transcript showing Ward had previously testified that she left her apartment two to three minutes after 1:00 pm. *Johnson*, 505 F.3d at 1144 (Defense counsel asked

Ward, "Would it refresh your recollection if I showed you the transcript?" Ward answered, "Sure," and defense counsel responded, "Okay."). As found by the federal district court, "it is clear from the record that the jury was made aware that her testimony regarding the time she left her apartment on December 14, 1984 had not been entirely consistent." Petitioner's App. D at 92a. The above shows the facts of Petitioner's case are readily distinguishable from those in *Chambers*, and instantly establish that the trial court's ruling did not deny Petitioner "a trial in accord with traditional and fundamental standards of due process." *Id.*, 410 U.S. at 302.

As with his other claims to this Court, Petitioner provides no compelling reason why this Court should exercise jurisdiction over this case. Petitioner's claim rests on an allegation that the Tenth Circuit misapplied a decision by this Court, and Respondent has established that his claim is without merit. Rule 10, *Rules of the Supreme Court of the United States*. For these reasons, Respondent urges this Court to deny certiorari review of this claim.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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